No. 71-922

In the Supreme Court of the United States

OCTOBER TERM, 1971

HERBERT J. COHN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 1971. The petition for a writ of certiorari was filed on January 14, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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QUESTIONS PRESENTED

1. Whether grand jury testimony relating to events more than six years before the date of inquiry was material to the grand jury's inquiry.

2. Whether the evidence against petitioner was sufficient under the standard applicable to perjury prosecutions.

3. Whether false testimony before a grand jury constitutes an obstruction of justice under 18 U.S.C. 1503.

STATEMENT

After a trial by jury in the United States District Court for the Southern District of New York, petitioner was convicted of perjury and obstruction of justice, in violation of 18 U.S.C. 1621 and 1503. The district court fined petitioner $2,500 on each of two counts, imposed concurrent sentences of imprisonment for one year, suspended the sentences except for sixty days' imprisonment, and placed petitioner on probation for two years. The court of appeals affirmed (Pet. App. 1–6).

In 1970, a grand jury in the Southern District of New York was investigating possible corruption involving government and labor union officials, including the misuse of welfare and pension funds of various unions, in violation of 18 U.S.C. 1954 and other statutes. The grand jury questioned petitioner, who had been granted immunity, about the meaning of certain notations on the back of an envelope addressed to his son and postmarked March 27, 1963. The notations included the following apparently disconnected

words: "indictment", "embezzlement", "5 Count GJ", "Mele", "Buffalino Father in Law", "Detroit", and "O'Brien." Petitioner testified that he had never seen the envelope before, did not recognize any of the handwriting, did not understand any connection with Bufalino, and had no recollection of the envelope or any of this (Pet. App. 2a–3a; App. 401–403; Grand Jury Exhibit 1, Government Exhibit at trial 7). The indictment charged that in so answering, petitioner committed perjury (count 2) and that his false and evasive testimony was an obstruction of justice under 18 U.S.C. 1503 (count 3) (App. 403–406).[1]

The meaning of the notations on the envelope shown to petitioner and their significance and materiality to the grand jury's investigation was shown principally by the testimony of Herbert Itkin, an attorney deeply involved in these matters who had become a government informant. Itkin testified that from the mid-1950's to 1965 he shared office space in New York City with petitioner, who was his accountant. In the fall of 1962, Itkin told petitioner that David Wenger, accountant for the Teamsters' Union, had inquired whether petitioner knew anybody in the Department of Labor with whom they could work out a deal to obtain some information. Petitioner suggested the name of Morris Enamuel (Tr. 30–35). Itkin and petitioner thereafter met with Enamuel and discussed Wenger's problem, which related to embezzlement charges against a union official in Milwaukee (Tr. 35–38).

[1] Count 1 of the indictment, charging petitioner with perjury before the grand jury on another date, resulted in an acquittal.

In March 1963, Itkin and petitioner met with Emanuel about another Teamster matter. Emanuel said that Wenger had insufficiently paid him in the Milwaukee matter, that he had "the top information in the country" and that he wanted to be paid well. In reply to Emanuel's question about where the money would come from, Itkin told him that they were handling a lot of Teamster mortgages and that he would see that Emanuel got paid from the kickback for a loan, which would normally go to the Teamster fund (Tr. 39–41). Two days later, petitioner told Itkin that Emanuel was on his way to San Juan to get information on the matter discussed, which concerned the top Teamster official in Puerto Rico. About a week after that, petitioner told Itkin that Emanuel was promising important information, but wanted a more definite understanding about his remuneration. Itkin responded by promising to see James Hoffa in Florida, at which time he would be in contact with Emanuel through petitioner, who was in New York (Tr. 44–48).

Pursuant to this plan, Itkin went to Florida and met with Hoffa, Wenger and Bill Bufalino. On the following day, Itkin returned to New York and asked petitioner why he had not been available when he called the night before (Tr. 48–50). Petitioner said that he had to go to a very important meeting, but that he had received the information and had given it to his wife. He continued, "Here's what we wrote down and here's what Pearl has down. Let me explain it to you." Petitioner handed him a little envelope

with some information on it and explained that there were five counts against the official in Puerto Rico, including one for a false filing and another for embezzlement. Emanuel had made several suggestions as to how to beat the case, including one about two men in Detroit, Mele and O'Brien, who were said to have something to do with the embezzlement charge. (Bufalino was Mele's father-in-law.) Itkin said he wanted to make a call and asked for the envelope to refresh his memory. Petitioner gave it to him. The same day, Itkin delivered the envelope to the F.B.I. (App. 50–52).

A handwriting expert from the F.B.I. laboratory testified that some of the words on the envelope were definitely in the handwriting of petitioner's wife, while other words contained significant similarities to her writing (Tr. 169–186). Other testimony at trial related to the eventual payment of five hundred dollars by petitioner to Emanuel for his services (Tr. 55–60). Petitioner, testifying in his own behalf, asserted the truth of his grand jury testimony and denied receiving the five hundred dollars (Tr. 254–258).

ARGUMENT

1. Petitioner argues that, since the statute of limitations barred prosecution on the particular malfeasance to which his testimony related, the inquiry was not material to the subject of the grand jury investigation. But the pencilled notations gave objective corroboration to Itkin's account of the relationship that existed in 1963 between certain labor leaders and a

high official in the Department of Labor. If petitioner had truthfully answered questions regarding the significance of the notations, this would have led to other information concerning the activities of Emanuel, who retained his official position until 1968 (App. 275–276, 151–152). As the court of appeals pointed out, "the test of materiality is whether the false testimony has the natural effect or tendency to impede, influence or dissuade the grand jury from pursuing its investigation." *United States* v. *Stone*, 429 F.2d 138, 140 (C.A. 2). This Court has noted, in another context, that "[w]hen the grand jury is performing its investigatory function into a general problem area, without specific regard to indicting a particular individual, society's interest is best served by a thorough and extensive investigation." *Wood* v. *Georgia*, 370 U.S. 375, 392. The investigation here reasonably extended to a matter that, while somewhat remote in time, bore a close relationship to matters of immediate interest to the grand jury. Petitioner had a clear duty to give truthful answers to the questions put to him.

2. Expert testimony that the notations on the envelope were written by petitioner's wife, together with Itkin's possession of the envelope, which was addressed to petitioner's son, furnish sufficient corroboration to the Itkin account. The question of corroboration was submitted to the jury under instructions to which petitioner has not objected (App. 100). See *Weiler* v. *United States*, 323 U.S. 606.

3. Petitioner argues that false and evasive testimony before a grand jury cannot amount to an obstruction

of justice under 18 U.S.C. 1503. As the court below noted, the same contention was made and rejected with respect to a charge of impeding an administrative investigation under 18 U.S.C. 1505. *United States* v. *Alo*, 439 F.2d 751 (C.A. 2), certiorari denied, October 12, 1971, No. 71-20 this Term.

The omnibus or "catch-all" clause of Section 1503 has been recognized as "broad enough to cover any act, committed corruptly, in an endeavor to impede or obstruct the due administration of justice." *United States* v. *Cohen*, 202 F.Supp. 587, 589 (D. Conn.); see *Falk* v. *United States*, 370 F.2d 472, 476 (C.A. 9), certiorari denied *sub nom. Wunder* v. *United States*, 387 U.S. 926; *Catena* v. *United States*, 176 F.2d 884, 887 (C.A. 9); *United States* v. *Kobrak*, 121 F.2d 333, 335 (C.A. 2), certiorari denied, 314 U.S. 626; *Samples* v. *United States*, 121 F.2d 263, 265 (C.A. 5); *United States* v. *Solow*, 138 F. Supp. 812, 814-815 (S.D.N.Y.); *United States* v. *Siegel*, 152 F. Supp. 370 (S.D.N.Y.), affirmed, 263 F.2d 530 (C.A. 2), certiorari denied, 359 U.S. 1012.

This Court held in *In re Michael*, 326 U.S. 224, 229, that perjury before a grand jury, which had to be proved by independent evidence, could not be punished as a contempt. In *United States* v. *Essex*, 407 F.2d 214 (C.A. 6), relied upon by petitioners, the court viewed Section 1503 as a substitute for contempt and applied the *Michael* rationale to a false affidavit filed on a motion for a new trial. The court held that such an affidavit was not an obstruction of justice in the absence of proof that it impeded the court in the con-

duct of its business. Whatever the validity of that decision, it does not apply to this case for here the judge charged the jury that it had to find not only that petitioner gave false and evasive answers but also that he willfully endeavored to influence, obstruct or impede the official inquiry undertaken by the grand jury (Tr. 405–410).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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